What You Need to Know to Protect Your Job – Ethics for Court Staff

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ADVISORY OPINIONS OF INDIANA COMMISSION ON JUDICIAL QUALIFICATIONS

HIRING
&
RECOMMENDATIONS

ADVISORY OPINION

Code of Judicial Conduct **#2-98**
Canon 3C(4)

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

ISSUE

At issue is the appropriate interpretation of Canon 3C(4) of the Code of Judicial Conduct, which provides that "a judge shall avoid nepotism and favoritism." Nepotism and favoritism are overlapping concepts, the former involving favoritism towards relatives of the judge. In either instance, the prohibition is against allowing judges' relationships to direct the judges' decisions about employment and appointments.

ANALYSIS

The rule does not mean that a judge may never employ or appoint either a legal relative, friend, or political ally. However, the prospective employee's merit and concerns for the proper administration of justice must be paramount in the decision. Otherwise, the judge violates not only Canon 3C(4), but Canon 2B, which precludes judges from using the office to advance the private interests of others. Additionally, a judiciary free of nepotism and favoritism is critical to the public's trust in the fairness and integrity of the legal system; a judge who practices nepotism and favoritism also violates Canons 1 and 2 which obligate judges to uphold the integrity and independence of the judiciary and to at all times promote the public's confidence in it.

Judges who are considering hiring a relative or friend, or anyone referred to the judge or recommended by a relative or friend, must consider the following factors. The first question is the degree, extent, or depth of the relationship of the prospective employee to the judge. For example, the employment or appointment of a spouse likely will never be appropriate. On the other hand, the Commission has, from time to time, approved the hiring of a more distant relative, after consideration of the other factors discussed below. With this, and all considerations suggested in this opinion, the predominant issue is merit.

Also pertinent to the decision is whether or not the position for the prospective employee is relatively lucrative, whether it is permanent or temporary, full-time or part-time. Employing a relative as a temporary filing clerk during another employee's leave of absence, a circumstance the Commission has approved, is unlikely to threaten the public's trust, whereas a judge who confers upon a sibling, child, parent, or member of the judge's household a key post in the judiciary likely will be scrutinized by the Commission.

Another relevant factor is the degree of day-to-day supervision and contact the judge would have with the prospective employee. A judge who hires, for example, a niece or nephew as bailiff without the Commission's approval invites public criticism and a Commission inquiry, whereas the Commission may be inclined to approve the employment of the same relative as, for example, a secretary in the probation department.

Finally, the position for which the judge is considering hiring a friend or relative must be announced or advertised to the public in the same manner other vacancies within the court are announced or advertised, and other qualified applicants must be considered. Only if the friend or relative is objectively qualified for the position, and only after the judge has weighed every relevant factor, may the judge hire or appoint a friend or relative. The Commission urges judges to seek the Commission's approval before hiring or appointing a relative or close friend to any position.

CONCLUSION

The rule against nepotism and favoritism requires a judge to consider the degree of the judge's relationship to a prospective employee or appointee, as well as whether the position is relatively lucrative, whether it is full-time or part-time, permanent or temporary, and the degree to which the judge would supervise the employee. A judge inclined to hire a relative or friend must base the decision primarily on merit, and must give others the opportunity to apply.

Indiana Judicial Nominating Commission
Indiana Commission on Judicial Qualifications
323 State House
Indianapolis, Indiana 46204
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ADVISORY OPINION

Code of Judicial Conduct
Canon 2

#3-88

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

ISSUE

The issue is whether a judge may write or otherwise make a recommendation of an individual for employment.

ANALYSIS

Canon 2 of the Code of Judicial Conduct provides in part, "A judge...should not lend the prestige of his office to advance the private interests of others....He should not testify voluntarily as a character witness." Canon 2B. The Commission rejects the strictest possible application of this language to the question at hand and has decided that a judge with first-hand, substantial knowledge of an individual's qualifications will not be prevented from making a recommendation for employment on behalf of that person.

The act of making a professional recommendation for employment is unlike the prohibited voluntary testimony as a character witness in Canon 2B in that it is not subject to the abuses presumably targeted by the prohibition. A typical recommendation will not involve public testimonials, thus potentially detracting from the dignity of the office, and cannot be exploited to deflect attention from the merits of a factual contest and potentially affect the outcome of a legal proceeding.

So customary is the practice of recommendations within a profession that, when made by a judge, it is less a function of the judicial position than it is of the judge's position within the legal community at large. This does not mean that the fact of the judicial position

will not be seen as relevant to the weight of the recommendation; however, the Commission cannot view an ordinary recommendation from a judge, even if drafted on court stationary, as an exploitation which Canon 2 is designed to prevent.

Of course, as with any advice given in response to a general inquiry, this opinion does not grant blanket approval for any recommendation under any circumstance. Myriad situations could arise in which a judge should not make a recommendation. For example, if he cannot sincerely and with personal knowledge give a recommendation, he should not do so. Also, a judge should consider whether a recommendation of employment on behalf of an individual seeking work with a law firm or government office which frequently practices in his court might give his recommendation more meaning than is proper or even create a challenge to the judge's impartiality when the individual is hired and appears before him. These are issues the judge will have to consider case by case.

CONCLUSION

A judge is not necessarily prohibited from making a recommendation for employment so long as it is based on substantial, first-hand knowledge of the qualifications of the individual recommended.

DISQUALIFICATION ISSUES

ADVISORY OPINION

Code of Judicial Conduct #4-93
Canon 3

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

ISSUE

The issue is whether the appearance of a lawyer who is the spouse of a continuing part-time or a full-time judicial officer requires the disqualification of the regular judge.

ANALYSIS

The Code of Judicial Conduct requires a judge to disqualify if the judge's spouse or relative within the third degree is acting as a lawyer in the proceeding, Code of Judicial Conduct, Canon 3E(1)(d)(ii), and whenever the judge's impartiality might reasonably be questioned. Canon 3E(1). When an attorney in a proceeding is married to one of the court's commissioners, magistrates, or referees, the spouse obviously is disqualified. The question is whether disqualification is required of the regular judge when an attorney is married to or is a close relative of one of the judge's judicial officers.

A per se rule of disqualification under these facts alone would presume a legitimate concern that the judge will have a propensity to rule differently because of the attorney's relationship with the judicial officer. The Commission is not inclined to adopt that presumption. A judge is not necessarily disqualified when a lawyer appears who is affiliated with the judge's spouse, see, Commentary, Canon 3, when the lawyer is the judge's cousin, see, Advisory Opinion #3-90, or when the lawyer is married to the judge's bailiff, see, Advisory opinion #4-89. So long as the judge discloses on the record to all parties the fact of the lawyer's relationship to the judicial officer, disqualification based upon the relationship alone is not required.

Another concern, however, is the potential appearance that the attorney is in a favored position by virtue of the relationship to the court employee. First, both the attorney and the spouse have specific ethical duties to protect the tribunal from appearances of

impartiality and to not exploit the relationship for the benefit of the practitioner. The practitioner may neither attempt to improperly influence the court through the relationship, Rules of Professional Conduct, Rule 3.5(a), nor imply an ability to influence the court, Rule 8.4(e). The commissioner, magistrate, or referee may not engage in improper ex parte communications, Canon 3B(8), and may not comment on any proceeding in a manner which might be expected to affect its outcome or fairness. Canon 3B(10).

In Advisory Opinion #4-89, the Commission addressed the court's duties when an attorney appears who is the spouse or near relative of a court employee. The Commission advised that the court should not allow the employee to participate in any way in the proceedings, and suggested that the judge issue an order stating that the intent of the court was to eliminate appearances of impropriety, that the employee was not to act in any capacity on cases involving the relative, and that neither was to discuss pending court cases with the other. A similar Order would be appropriate under the circumstances described in this opinion.

CONCLUSION

The fact that a lawyer in a proceeding is the spouse or close relative of a judge's commissioner, magistrate, or referee does not in itself require the judge's disqualification.

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ADVISORY OPINION

Code of Judicial Conduct
Canon 3

#4-89

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

ISSUE

Several judges have asked the Commission about their duties when a court reporter, bailiff, law clerk, or other employee under the judge's direction and control has a spouse or near relative who is an attorney, litigant, or material witness in a pending case.

ANALYSIS

It is presumed for the purposes of this opinion, of course, that the judge faced with this issue does not personally have any disqualifying relationships, interests, or biases, but that one of the judge's employees whose work brings the employee in contact with the record, the jury, or any other aspect of the proceedings, is married to or is a near relative of a lawyer, litigant, or material witness in the proceedings. The specific situations brought to the Commission's attention involve a bailiff whose father-in-law is an attorney in the county and often practices in the inquiring judge's court, a court reporter whose husband is an attorney in a pending proceeding, a court reporter whose brother is an attorney in a pending proceeding, and a court reporter whose husband is the Sheriff and is often a material witness for the State.

Canon 1 of the Code of Judicial Conduct requires a judge to enforce high standards of conduct in order to preserve the integrity and independence of the judiciary. Canon 2 requires the judge to avoid the appearance of impropriety and to promote public confidence in the impartiality of the judiciary, and Canon 3B(2) states that a judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence which apply to him. When an employee's relative enters an appearance or

otherwise participates in a pending proceeding, the judge must preserve the independence of the judicial system from conflicts and the appearance thereof by directing the employee against participating in the case in question. The Commission's advice to these judges has been to substitute the employee with another when the spouse or relative is participating in the proceedings. The Commission found it effective that one judge, upon appointing as bailiff the daughter-in-law of a local practitioner, issued an Order stating that the intent of the court was to eliminate appearances of impropriety, that the bailiff was not to act in any capacity on cases involving her relative, and that neither was to discuss pending court cases with the other.

CONCLUSION

If a spouse or near relative of one of a judge's employees under his direction and control is a lawyer, litigant, or material witness in a pending case, the judge should instruct the employee not to participate at all in the proceedings.

EX PARTE & TRIAL RULES 53.1 & 53.2

ADVISORY OPINION

Code of Judicial Conduct **#1-01**
Canon 3
***Ex Parte* Custody Orders**

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

ISSUE

The issue in this Advisory Opinion is the appropriate judicial response to an *ex parte* child custody request in which a party seeks a temporary custody order without prior notice or an opportunity for a hearing afforded any other party with a legal interest. It focuses on the application of Trial Rule 65(B), governing temporary restraining orders, and its pertinence in the contexts of legal separations, dissolutions, post-dissolutions, guardianships, or adoptions, when a party requests a custody order without notice or a hearing.[1]

The Commission concludes that a judge must follow T.R. 65(B) when petitioned for an *ex parte* temporary custody order; otherwise, the judge violates Canon 3B(8) of the Code of Judicial Conduct prohibiting improper *ex parte* contacts, as well as Canons 1 and 2 of the Code, which require judges to uphold the integrity and independence of the judiciary, to respect and comply with the law, and to act at all times in a manner which promotes the public's confidence in the integrity of the court. Lawyers seeking this relief without adherence to the rules may violate Rule 3.5(b) of the Rules of Professional Conduct, which prohibits improper *ex parte* communications by lawyers. *See Matter of Anonymous*, 729 E.2d 566 (Ind. 2000).

ANALYSIS

This opinion does not represent a change or evolution in the Commission's views or in its interpretation of the relevant sections of the Code of Judicial Conduct. Rather, the opinion is generated by a substantial number of ethics complaints reviewed by the Commission in which judges have granted *ex parte* temporary child custody petitions which may state insufficient grounds for extraordinary relief or, in any case, where the judge does not adequately ensure the fairness of the proceedings, which is accomplished

by careful adherence to T.R. 65(B).[2] *Id.*

Trial Rule 65(B) protects against abuses by requiring the petitioner to state by affidavit specific facts showing that immediate and irreparable injury, loss, or damage will result before an adverse party may be heard in opposition, and by requiring the petitioner to certify in writing any efforts made to give notice and the reasons supporting the claim that notice should not be required. It calls for security in a sum deemed appropriate by the court for the payment of costs and damages which may be incurred by a party wrongfully enjoined or restrained. It requires the judge to define the injury in the order, and to state why it is irreparable and why the order was granted without notice. When a temporary restraining order is granted without notice, the court must set it for a hearing at the earliest possible time, giving precedence to it above all other matters.

The cases the Commission has scrutinized indicate a lack of mindfulness that *ex parte* requests and resultant orders affecting custodial rights are extraordinary, and that the relief depends upon the existence of exigent circumstances – irreparable injury, loss, or damage without immediate relief. A request for emergency relief should not supplant what in reality constitutes a standard invocation of the court's powers through the trial rules, which rules generally are premised on the notion that a fair proceeding involves the commencement of a proceeding, reasonable notice, and a chance to be heard on the merits by any party with a legal interest before judicial action occurs. Judges and lawyers should proceed with meticulous attention to T.R. 65(B) whenever emergency custody is requested, whether upon the commencement of an adoption proceeding, a guardianship of a child, a legal separation or divorce, or a post-dissolution modification. Inattention to the extraordinary nature of the relief, and to the procedural demands the rules impose, undermines judicial fairness and integrity, and the public's trust.

The circumstances leading to the ethics inquiries reviewed by the Commission sometimes involve a non-custodial parent who, instead of returning a child after a visitation period, determines he or she wants custody – a modification – and files for, and obtains, immediate custody. The custodial parent, perhaps out-of-state, discovers only after the fact that an Indiana court has suspended the parent's custodial rights to their children. The parent then is compelled to make arrangements to obtain counsel, travel to Indiana for an immediate hearing, if the judge has expedited the case as required, and, if not, or if a continuance is needed for preparation, the custodial rights are suspended even longer. Of course, many are without the resources to defend the action at all.

Sometimes all the parties are local residents, and, perhaps, both have attorneys. The proceeding may be a new dissolution, or a guardianship or adoption. What is wrong is when an *ex parte* custody decision is made absent truly emergency circumstances and without regard to the details of T.R. 65(B). When this occurs, the perception is that custodial rights have been affected based only upon whether the petitioner has won a "race to the courthouse."

The Commission's intention is not to curtail the proper exercise of broad judicial discretion, nor do the members intend to substitute their judgments for that of a judge who finds on some rational basis that circumstances warrant emergency relief. The Commission members hope to improve and promote the

integrity of our judiciary, and to help promote the public's confidence in the judiciary, by alerting judges, and lawyers, to the stringent and imposing ethical duties judicial officers undertake when considering whether to affect custodial rights *ex parte*. In considering a request for emergency custody of a child, or any other request under T.R. 65(B), a judge should be as cautious with the rights of the opposing party as with scrutinizing the merits of the petition.

A petitioner for a temporary restraining order under T.R. 65(B) must establish not only the potential for irreparable harm, but that the harm will occur before an adverse party may be heard; the petitioner must certify also what efforts at notice have been made and why notice is not required. A judge should carefully determine whether these elements are established. While the Commission hesitates to suggest a list of circumstances which the members would not favor, some examples may be helpful.

Many times, of course, these petitions present compelling reasons for an eventual custody order; yet, if the pleading really is a request for custodial rights, whether or not captioned as an emergency, it should not be treated as an emergency. An *ex parte* custody order is not properly a means to initiate a modification proceeding or to obtain an advantage in a subsequent petition on the merits of modification or other custody issue. Again, the custody request may be in the context of an adoption or guardianship, and not necessarily a dispute between two parents. Those proceedings, like modifications, presumably are not adjudicated without first providing any interested party the right to be heard, including on an interim custody issue. In those cases, too, petitioners for *ex parte* relief must set out a verified claim that irreparable injury will result without the emergency relief.

A claim that the custodial parent has violated an existing order, perhaps concerning visitation, should not alone justify emergency custodial relief. Those issues are addressed through the contempt process, or by injunction pursuant to I.C. 31-14-5-1. Similarly, a claim that the custodial parent has decided to move out of state, or that the child has expressed a desire to reside with the petitioner, does not justify emergency relief. These are issues for a modification hearing and for the application of the appropriate standard supporting a modification order.

Also, for example, the desire to enroll a child in school, if it requires custodial rights, does not in the Commission's view, *in itself*, justify a temporary modification of custody before the parent who currently has the custodial rights to make those arrangements has been heard. The petitioner may allege that harm will result if he or she cannot enroll the child, but the requisite potential harm cannot be only a personal or strategic disadvantage or the fact that existing orders keep the party from his or her objectives. Again, the standard is *irreparable harm or injury*. Some real emergency must exist which changes the complexion of the case from one which simply involves a parent who desires a modification and custodial rights, to one possibly warranting emergency action in the petitioner's favor. Even then, T.R. 65(B) must guide the process, providing the safeguards of the affidavit, detailed findings, and an immediate hearing.

Concerning the absence of notice and a hearing in these proceedings, the rule similarly provides safeguards against abuse. The rule requires a showing that irreparable harm will occur before notice may be given or before an adverse party may be heard. It can mean only that, where those representations indicate that

notice and a hearing could be accomplished without harm, they should occur. A judge should insist on notice and a hearing if it is feasible and would not result in the alleged irreparable harm. In other words, there may be no good reason, even under the petitioner's claim, why notice should not be given and a hearing held before a ruling. A simple telephone call to opposing counsel, or to the other parent, and an offer to schedule a hearing before ruling, only promotes the integrity of the process.

In assessing both the sworn statements of the alleged irreparable harm which could result without the order, and the written certifications about notice or reasons for not providing it, if the judge does not insist on an abundance of facts in the pleadings, the judge should be prepared to actively question the petitioner or the petitioner's attorney about these claims. The key inquiries pertain to why the petition is submitted *ex parte*. Where is the other party? What notice has been accomplished? Why should this matter be heard without the opposing party's participation? What exactly is the *irreparable harm* which would result if the case simply is set for a hearing after notice is made? No such potential harm was indicated in the instances investigated by the Commission.

Some judges insist that counsel bring in the petitioner to discuss these aspects of the petition. Other judges have expressed concern that these recommended discussions themselves constitute improper *ex parte* contacts. These concerns are misplaced. After all, the judge properly has entered into an *ex parte* proceeding if T.R. 65(B) is followed. To gather information which helps the judge determine whether the extraordinary relief is warranted only bolsters the fairness of the *ex parte* process which is underway. Nonetheless, the judge should not entertain discussions which go beyond what he or she believes is necessary to adequately entertain the petition. Ideally, the conversation will be recorded.

Surely, many petitions for emergency custody raise issues which appear to require immediate action. Judges often are faced with real emergencies, and they may deem a situation an emergency where other reasonable people would differ. But even in those cases, consideration of the opposing party's rights is required. Again, T.R. 65(B) provides this underpinning of fairness. Of course, judges should be able to trust in the veracity of a sworn petition alleging that harm will result without an *ex parte* order. In reality, some are less than truthful, for which the judge is not accountable. However, T.R. 65(B) imposes important burdens on the petitioner, which likely will reduce the instances of false or unfounded petitions.

The Commission calls on the profession to eliminate the seemingly wide-spread practice in Indiana where lawyers seek, and judges provide, *ex parte* emergency custody where no irreparable harm or injury reasonably is foreseen without notice and a hearing – the fundamentals of our adversarial process. T.R. 65(B) provides the framework for fairness; judges and lawyers must make genuine assessments about whether the circumstances really invoke the rule at all. When this occurs, the Commission expects to review fewer citizen complaints about a lax and unfair procedure which adversely affects their most precious rights.[3]

CONCLUSION

Ex parte emergency custody orders in dissolution, post-dissolution, guardianship, and adoption proceedings must be considered the rare exceptions to the general premise that a fair proceeding includes reasonable notice and an opportunity to be heard. When the circumstances do warrant emergency *ex parte* relief, petitioners and judges must follow T.R. 65(B).

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[1] This opinion does not directly apply to proceedings which may involve custody issues but which properly are *ex parte*, such as protective order cases, or other matters which operate pursuant to their own statutory provisions, such as
juvenile detention or CHINS placement proceedings. Generally, it does apply to any petition for a temporary restraining order under T.R. 65(B), whether or not custody issues are involved. *See Matter of Jacobi*, 715 N.E.2d 873 (Ind. 1999).

[2] Black's Law Dictionary describes a temporary restraining order as "an emergency remedy of short duration which may issue only in exceptional circumstances and only until the trial court can hear arguments or evidence, as the circumstances require...A temporary restraining order may be granted without written or oral notice to the adverse party or attorney only if...it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition".

Trial Rule 65(B),(C), (D), and (E) provide as follows:

(B) Temporary restraining order – Notice – Hearing – Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

> (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and
>
> (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.

Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten [10] days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the whereabouts of the party against whom the order is granted is unknown and cannot be determined by reasonable diligence or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two (2) days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(C) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of a governmental organization, but such governmental organization shall be responsible for costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(D) Form and scope of injunction or restraining order. Every order granting temporary injunction and every restraining order shall include or be accompanied by findings as required by Rule 52; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(E) Temporary Restraining Orders – Domestic Relations Cases. Subject to the provision set forth in this paragraph, in an action for dissolution of marriage, separation, or child support, the court may issue a Temporary Restraining Order, without hearing or security, if ether party files a verified petition alleging an injury would result to the moving party if no immediate order were issued.

(1) *Joint Order.* If the court finds that an order shall be entered under this paragraph, the court may enjoin both parties from:

(a) transferring, encumbering, concealing, selling or otherwise disposing of any joint property of the parties or asset of the marriage except in the usual course of business or for the necessities of life, without the written consent of the parties or the permission of the court; and/or

(b) removing any child of the parties then residing in the State of Indiana from the State with the intent to deprive the court of jurisdiction over such child without the prior written consent of all parties or the permission of the court.

(2) *Separate Order Required.* In the event a party seeks to enjoin the non-moving party from abusing, harassing, disturbing the peace, or committing a battery on the petitioning party or any child or step-child of the parties, or exclude the non-moving party from the family dwelling, the dwelling of the non-moving party, or any other place, and the court determines that an order shall be issued, such order shall be addressed to one person. A joint or mutual restraining or protective order shall not be issued. If both parties allege injury, they shall do so by separate petitions. The trial court shall review each petition separately and grant or deny each petition on its individual merits. In the event the trial court finds cause to grant both petitions, it shall do so by separate orders.

(3) *Effect of Order.* An order entered under this paragraph is automatically effective upon service. Such orders are enforceable by all remedies provided by law including contempt. Once issued, such orders remain in effect until the entry of a decree or final order or until modified or dissolved by the court.

(F) Statutory Provision Unaffected by this Rule. Nothing in this rule shall affect provisions of statutes extending or limiting the power of a court to grant injunctions. By way of example and not by way of limitation, this rule shall not affect the provisions of 1967 Indiana Acts, ch. 357, § § 1-8[1] relating to public lawsuits, and Indiana Acts, ch. 7, § § 1-15[2] providing for removal of injunctive and mandamus actions to the Court of Appeals of Indiana, and Indiana Acts, ch. 12 (1933).[3]

[1] IC 34-4-17-1 to 34-4-17-8.

[2] IC 34-4-18-1 to 34-4-18-13 (Repealed).

[3] IC 22-6-1-1 to 22-6-1-12.

[3] The Commission, clearly, cannot contemplate all the potential circumstances which may arise. Judges may find themselves faced with truly unusual or unexpected sets of facts, and they must be able to proceed within their sound discretion. Nonetheless, these are not the circumstances which inspired this opinion.

ADVISORY OPINION

Code of Judicial Conduct **#2-07**
Canon 3

A party in a case delayed by the judge may, under Indiana Trial Rules 53.1 and 53.2, file a praecipe representing that the judge has not set a motion for hearing within 30 days, has not ruled on a motion within 30 days if a hearing is not required, or has not ruled for over 90 days on an issue taken under advisement. The rules require the Clerk of the court to determine whether a delay has occurred and, if so, to give written notice to the judge and to the Supreme Court that the case has been withdrawn from the judge, after which the Supreme Court appoints a special judge to assume jurisdiction.

The Commission occasionally reviews complaints against judges alleging that they, rather than the Clerks, have ruled on Trial Rule 53 motions or have, upon the filing of Rule 53 praecipes in which delays have occurred, set the delayed hearings or ruled on the delayed motions. These complaints often raise valid concerns that the judges have violated Canons 1 and 3B(2) of the Code of Judicial Conduct, which require judges to respect and comply with the law.

The Commission advises judges and Clerks that Rules 53.1 and 53.2 require the Clerk, and not the court, to assess motions alleging delays and seeking withdrawal from the court. If the Clerk determines that withdrawal of a case is required, the withdrawal is effective as of the time the praecipe is filed. Ind. Trial Rule 53.1(e)(2). Judges should not interfere with this process, although they and their staff should assist the Clerk, if necessary, in the Clerk's determination.

Rule 65. Injunctions

(B) Temporary restraining order - Notice-Hearing -Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and
(2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten [10] days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the whereabouts of the party against whom the order is granted is unknown and cannot be determined by reasonable diligence or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two (2) days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

EMPLOYEE POLITICAL ACTIVITES

Indiana Judicial Nominating Commission
Indiana Commission on Judicial Qualifications
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ADVISORY OPINION

Code of Judicial Conduct #1-90
Canon 7

The Indiana Commission on Judicial Qualifications issues the following advisory opinion concerning the Code of Judicial Conduct. The views of the Commission are not necessarily those of a majority of the Indiana Supreme Court, the ultimate arbiter of judicial disciplinary issues. Compliance with an opinion of the Commission will be considered by it to be a good faith effort to comply with the Code of Judicial Conduct. The Commission may withdraw any opinion.

ISSUE

At issue here are the guidelines pertaining to partisan political activity which a judge must impose upon those employees subject to the judge's direction and control. Specifically, the questions are:

> 1. To what extent the judge's employees may participate in partisan political activity while at the work place or during working hours, such as displaying campaign buttons, posters, and bumper stickers, and,
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> 2. To what extent they may participate in partisan politics not during working hours or at the work place, such as managing or participating in committees, campaigning for candidates, or themselves running for partisan elective office.

ANALYSIS

A judge should not permit those employees subject to the judge's direction and control to engage in any campaign conduct while on duty or at the court offices. The display of campaign buttons, posters, bumper stickers, and similar items must be forbidden. The Commission members believe that this prohibition would pass constitutional muster, as it is necessary to implement valid public interests. See, e.g., Connealy v. Walsh (1976), 412 F.Supp. 146.

The display of partisan political paraphernalia by court employees is antithetical to fundamental notions that a court of law should operate independently of partisan interests. "Employees who display political buttons or bumper stickers...may convey the impression that the justice

system is partisan and, therefore, [that] citizens may not be treated fairly if they are not members of the publicized political party. [T]he public may lose confidence in a system that appears to be moved by political affiliation, rather than based on due process of law". Ozar, Kelly, & Begue, Ethical Conduct of Non-judicial Court Employees: a proposed model code, 73 Judicature, No. 3, (1989).

Furthermore, the judge's administrative duties and duties to preserve the dignity of and the public confidence in the judicial system pursuant to Canons 1, 2 & 3 of the Code of Judicial Conduct would prohibit a judge from using the courthouse as a campaign site. See, Matter of Conda (1977), N.J., 370 A.2d 16. Canon 3B(2) states that the judge should require his staff to observe the standards of diligence which apply to the judge. Also, Canon 7B(1)(b) states that the judge "should prohibit...employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon".

Despite the current reality that most Indiana judges are, of necessity, subject to political demands, a litigant's experience with the court and its personnel must be free of the air of partisanship. No campaigning may be permitted in connection with court-related duties.

2. Having concluded that a judge must prohibit those employees subject to his direction and control from engaging in partisan campaign activity while on duty, specifically having addressed the use of buttons, posters, and bumper stickers, the next issue is to what extent the judge must regulate the employees' partisan political activity while they are not on duty.

Some judges in Indiana have implemented policies which restrict their employees' partisan political activities to registering to vote and voting, belonging to a political party, and being politically active in non-partisan activities. The policies prohibit employees from soliciting or raising funds, managing committees, endorsing candidates, or working at polls in a partisan capacity.

These restrictions apparently would survive constitutional challenges, see, e.g., Broadrick v. Oklahoma (1973), 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830; see also, In Re Prohibition of Political Activities by Court Appointed Employees (1977), Pa., 375 A.2d 1257, and are attractive in part because they eliminate any danger of improprieties such as that employees will be or will feel pressured into political activity, will engage in these activities while on duty, or will use their court-related titles in connection with these activities. For these reasons, judges may choose to adopt these restrictions.

However, the Commission would not require as the judge's ethical duty this restrictive a policy. So long as those improprieties eliminated by the most restrictive policy -- pressure to participate, use of court time, resources, or titles -- are absolutely avoided, a judge may permit employees to lawfully participate in the partisan political

process, except that a 4udge's employee may not be a candidate for partisan elective office.

The Commission recognizes that, in offering this assessment that a judge's employee may not be a candidate for partisan elective office, it has chosen a place on a continuum of activity at which to draw a line, and that reasonable arguments can be made for imposing it elsewhere. If a probation officer, for example, may manage a candidate's committee, hold a fund raiser, or place a candidate's sign in the front yard, why then is that employee prohibited from becoming a candidate for partisan elective office without first resigning as probation officer or taking unpaid leave? The Commission considers in support of its position that an employee's political activity on someone else's behalf can, with diligence, be accomplished without linking the activity to the employee's position with the court, without detracting from efficiency on the job, and without injecting into the on-duty hours the air of partisanship which destroys the public's confidence in the impartiality of the judge. On the other hand, when a judge's employee is the candidate, embodying the partisan contest, the dangers lurk too near to be countenanced. Furthermore, the public may reasonably perceive that, because the candidate is employed by the judge, that the judge supports the candidate politically, which perception could involve Canon 2B, "A judge...should not lend the prestige of his office to advance the private interests of others...".

CONCLUSION

The Commission embraces as a guideline for judges in their regulation of their employees' political activities that portion of the Proposed Model Code for Non-judicial Court Employees published in Judicature, supra, which, in pertinent part states as follows:

> A) Each employee retains the right to vote as the employee chooses and is free to participate actively in political campaigns during non-working hours. Such activity includes, but is not limited to, membership and holding office in a political party, campaigning for a candidate in a partisan election by making speeches and making contributions of time or money to individual candidates, political parties or other groups engaged in political activity. An employee who

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'For the purposes of this restriction, the Commission does not consider a public defender as an employee of the judge subject to the judge's direction and control. While the public defender may serve at the pleasure of the judge, the public defender's role as advocate before the court, by definition, means the public defender is not serving at the judge's direction and control. White v. Galvin (1988), Ind.App., 524 N.E.2d 802, citing Polk County v. Dodson (1981), 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509.

chooses to participate in political activity during off-duty hours shall not use his or her position or title within the court system in connection with such political activities.

B) With the exception of officers of the court who obtain their position by means of election, no employee shall be a candidate for or hold partisan elective office. With the same exception, an employee who declares an intention to run for partisan elective office shall take an unpaid leave of absence upon the filing of nomination papers. If elected, he or she shall resign. An employee may be a candidate for non-partisan elective office or may be appointed to a non-partisan office without separating from employment, provided that the employee complies with the requirements in this Code concerning performance of duties, conflicts of interest, etc.

C) No employee shall engage in any political activity during scheduled work hours, or when using government vehicles or equipment, or on court property. Political activity includes, but is not limited to:

1) Displaying campaign literature, badges, stickers, signs or other items of political advertising on behalf of any party, committee, agency or candidate for political office;

2) Using official authority or position, directly or indirectly, to influence or attempt to influence any other employee in the court system to become a member of any political organization or to take part in any political activity;

3) Soliciting signatures for political candidacy;

4) Soliciting or receiving funds for political purposes.

1.10 ETHICS

A judiciary which upholds the high standards of integrity, impartiality and independence is indispensable to justice in our society. The holding of public employment in the court system is a public trust justified by the confidence that the citizenry places in the integrity of the officers and employees of the Court. As employees of the Court, we must manage our personal affairs, business affairs and work duties so as to avoid situations that might lead to conflict, or the appearance of conflict, between self-interest and our duty to the Court, to persons served by the Court and to the general public. With this in mind, all employees are reminded that common sense and good judgment should always dictate the proper course of conduct, while performing their work duties and in their personal and business affairs. Additionally, all Court employees shall uphold the Constitution, laws and regulations of the United States and the State of Indiana and never be a party to their evasion. All court employees shall abide by the standards set out in this Section.

The Court recognizes that its employees perform a wide variety of duties and responsibilities, some more directly related to the judicial operations than to the administrative operations of the Court. While not placing a higher value on one position over another, the Court believes that those positions which include duties and responsibilities directly relating to the judicial operations of the court are unique and must be handled as such. Accordingly, all law clerks and attorneys working directly for a Judge shall be bound by the applicable provisions of the *Code of Judicial Conduct.*

Regardless of their duties and responsibilities, all attorney employees are reminded that they are bound by the *Indiana Rules of Professional Conduct.*

Under the general provisions of this section, the Court desires to give specific guidance in the following areas:

Abuse of Position. No employee shall use or attempt to use his or her official position to secure unwarranted privileges or exemptions for the employee or others. No employee shall dispense special favors to anyone, whether or not for remuneration, nor shall any employee so act that the employee is unduly affected or appears to be affected by kinship, rank, position or influence of any party or person. No employee shall request or accept any compensation, monetary or otherwise, beyond that received by the employee in his or her official capacity, for advice or assistance given in the course of his or her employment.

Confidentiality. No Court employee shall disclose to any unauthorized person for any purpose any confidential information acquired in the course of employment, or acquired through unauthorized disclosure by another. Confidential information includes, but is not limited to, information on pending cases that is not already a matter of public record and information concerning the work product of any judge, law clerk, staff attorney or other employee, including, but not limited to, notes, papers, discussions and memoranda. All media requests for information shall be referred to the Court employee designated for that purpose. See also Section 1.09 of this Handbook.

Conflict of Interest. All Court employees shall avoid conflicts of interest in the performance of professional duties and in their personal lives. Even though no misuse of office may be involved, such a conflict of interest involving a Court employee can seriously undermine the community's confidence and trust in the court system. Therefore, all Court employees are required to exercise diligence in becoming aware of conflicts of interest, disclosing conflicts to their Agency Director or supervising Justice and ending them when they arise.

1. An employee shall not: (1) authorize or use the authority or influence of his or her office to secure authorization of any contract in which the employee, a member of the employee's family, or a business organization or person with which the employee is associated, has an interest; or (2) have an interest in the profits or benefits of a contract entered into by or for the use of the Court.

2. No Court employee shall receive compensation, monetary or otherwise, for representing, assisting or consulting with parties engaged in transactions or involved in proceedings with the court system.

3. No Court employee shall participate in any business decision involving a party with whom either the court employee or any member of the employee's immediate family is negotiating for future employment.

4. No Court employee shall solicit, accept or agree to accept any gifts, loans, gratuities, discounts, favors, hospitality or services under circumstances from which it could reasonably be inferred that a major purpose of the donor is to influence the Court employee in the performance of official duties.

5. All Court employees must immediately notify their Agency Director or supervising Justice if they have a personal or business relationship with either a litigant or attorney who has a matter pending before either the agency or the Court.

Outside Employment. Each full-time Court employee's position with the Court must be the employee's primary employment. Except as provided in this policy in the Personal Educational Activities Section, outside employment is permissible only if it complies with all of the following criteria:

1. The outside employment is not with an entity that regularly appears in Court or conducts business with the Court, and it does not require the Court employee to have frequent contact with attorneys who regularly appear in the Court; and

2. The outside employment is compatible with the performance of the Court employee's duties and responsibilities; and

3. The outside employment does not include the practice of law; and

4. The outside employment does not require or induce the Court employee to disclose confidential information acquired in the course of and by reason of official duties; and

5. The outside employment is not within the judicial, executive or legislative branches of state or local government; and

6. Where the outside employment would cause a conflict of interest to exists or reasonably appear to exist, whether or not the outside employment would reflect adversely on the integrity of the Court, the employee shall inform the Judge prior to accepting the other employment.

Nepotism. The employment of relatives in the same agency of the Court may cause serious conflicts and problems with favoritism and employee morale. In addition to claims of partiality in treatment at work, personal conflicts from outside the work environment can be carried into day to day working relationships. Decisions regarding employment of relatives are to be made consistent with Canon 3(C)(4) of the *Code of Judicial Conduct* and with the interpretations made by the judicial qualifications commission. Factors to be considered include, but are not limited to, the following: (a) nature of the position, whether temporary or permanent, as well as whether or not the position is relatively lucrative (b) whether or not the position was advertised to the public, (c) the nature of the relationship between the relative and the employee, (d) whether or not the relative lives in the same household as the employee, (e) the qualifications of the relative, (f) the duties and responsibilities of the position, and (g) the degree of supervision that would exist between the relative and the employee.

Personal Educational Activities. An employee may write, lecture, teach and speak on legal and non-legal subjects as long as the activities do not impair public confidence in the office or the Court or interfere with the performance of the employee's official duties. An employee may accept compensation and/ or reimbursement of expenses for any of the above listed activities under the following rules:

1. If the activity occurs during non-working hours, the employee may accept compensation and/or reimbursement of expenses.

2. If the activity occurs during working hours, the employee may accept compensation and/or reimbursement of expenses so long as the employee takes (a) paid benefit leave, (b) leave without pay, or (c) flex time satisfactory with the employee's supervisor for that period of the regular working hours that the employee is absent from his or her office.

3. Regardless of when the activity occurs, the employee may accept ordinary social hospitality for the occasion (i.e. meal, hors dourves, etc.) that is afforded other participants of the activity.

Attorneys, Practice of Law. Excepting those circumstances outlined in this section pertaining to pro bono activities and further in this paragraph, an employee who is an attorney shall not practice law. This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. An employee may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, an employee must not abuse the prestige of his or her position to advance the interests of the employee. An employee may also, without compensation, give legal assistance to and draft or review documents for a member of the employee's family.

Attorneys, Pro Bono Activities. Rule 6.1 of the *Rules of Professional Conduct* states that a lawyer should render public interest legal service. The Court believes that this is applicable to attorneys working directly for it as well as other members of the bar. Accordingly, the following applies to attorneys working for the Court:

1. All law clerks and attorneys working directly for a Judge shall be bound by the applicable provisions of the *Code of Judicial Conduct* and are prohibited from the practice of law. However, these individuals are encouraged to participate in other forms of pro bono activities that do not constitute the practice of law, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

2. All other attorneys working for the Court are bound by the *Rules of Professional Conduct* and are encouraged to participate in the providing of pro bono service. This may include the providing of professional services at no fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

If any law clerk or attorney working for the Judge desires to provide pro bono services under this section, he or she must perform the service where the odds are minimized that the matter being worked on will come before the Court and:

1. In the case of a law clerk or attorney working directly for a Judge, receive prior written permission from the Judge; or

2. In the case of a law clerk or attorney working for an Agency of the Court, receive prior written permission from the Agency Director and the Judge.

Furthermore, the Court anticipates that it is unlikely that approval will be given to an attorney or law clerk requesting permission to perform pro bono services that would result in the employee entering an appearance in any state court.

An employee shall immediately report his or her violation of this Ethics Policy, the *Code of Judicial Conduct*, or the *Rules of Professional Responsibility* to his or her agency director or the Judge. The

agency director will report the violation to the Judge who will cause an investigation to occur. Upon completion of the investigation, the employee may be subject to disciplinary action, up to and including immediate termination. Further, an employee who knowingly fails to report a violation which he or she committed shall be subject to discipline, up to and including immediate termination.

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Websites can play role in divorce cases

Social networks have become troves of evidence in divorce cases

By Will Higgins
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Mary Foley Panszi, an Indianapolis divorce lawyer, fondly recalls her discovery of a photograph of her client's husband with his new girlfriend.

The young woman in the photo held high her left hand, the better to show off her gaudy new ring.

The image "helped us apply pressure in mediation," Panszi said.

Metromix's cheating survey: http://indianapolis.metromix.com/events/photo_poll_gallery/metromixs-cheating-survey/2049539/content">Ever cheated? Been cheated on? We want to know why!

Panszi came by the photo not by spying or other traditional sleuthing but instead by making a few keystrokes on her computer.

She simply looked up the girlfriend's Facebook page.

Such social networking sites, remarkable for their candor and often protected by lax security, have become treasure troves of dirty laundry that increasingly are aired, or are threatened to be aired, as couples divorce.

The American Academy of Matrimonial Lawyers in a recent survey found that 81 percent of its members have had cases where information from Facebook, MySpace, Twitter or other such sites was a factor.

Previously, lawyers got the skinny on their opponents by hiring private detectives or obtaining phone records, said Marlene Eskind Moses, the academy's president, "but now with the social networking sites, you can go and pluck the information without any costs and gather all kinds of data."

Data that's hard to deny, such as photos of a divorcing dad with a bong. Kena Hollingsworth, an Indianapolis divorce lawyer who has conducted legal seminars on the use of social networking sites in divorce cases, twice came across such pay dirt.

"It gives your client a better bargaining position," she said.

"There's a basic human need to be known by others," said Sam Gosling, a University of Texas psychologist who is an expert on social perception. "And we don't always think things through."

Indiana is a so-called no-fault divorce state, meaning there is no legal penalty for extramarital affairs. In Panszi's case of the husband with his new girlfriend, the issue was not the girlfriend but the girlfriend's ring.

"Unless you can tie (an affair) to dissipation of marital moneys, it doesn't help you in terms of having evidence," said Andrew Soshnick, an Indianapolis divorce attorney.

But if there is a link, social networking can expose it. Soshnick has seen an opposing attorney's client boasting on Facebook of spending "significant amounts of money on jewelry and travel with a paramour," having forgotten to de-friend his soon-to-be ex-spouse.

"A thing like that can cost tens of thousands of dollars," he said.

Indiscretion is nothing new, but with social networking, a secret is more easily brought to the surface.

"The old way would be to tell a friend" of some exploit, said Melissa Avery, a divorce lawyer since 1994, "and even back then, word would get around. People talk."

But hauling in somebody's loose-lipped confidant to testify in court "would have been a lot more cumbersome than bringing in a Facebook posting."

Despite the availability of privacy settings on social websites, online identities may be more widely accessible than users realize -- either by accident, through a misunderstanding of the technicalities of such settings or through old-fashioned betrayal.

"Chances are somebody would be willing to access the site," said Eskind Moses of the lawyers' academy. "It's like, 'Can you keep a secret?' "

Such information rarely makes it to court before a judge, because most divorces are settled before going to a formal hearing, but its impact is felt during pretrial negotiating between opposing attorneys, most commonly in determining custody or visitation of children.

The Domestic Relations Counseling Bureau, which provides reports on parents' fitness to Marion County judges, frequently receives copies of incriminating posts, such as photos showing a parent intoxicated.

"Alcohol is often the issue," said Janice Davidson, the bureau's director. "People want to present themselves as not abusing alcohol, but with pictures, it's harder to slip away from that allegation. We don't base our decision on a few pictures, but it gives you another dimension in understanding who this person is.

"Pictures don't lie," Davidson said.

But they can be open to interpretation. Divorce lawyer Avery had a client who posted on his Facebook page a photo of him with his new girlfriend in a "sort of" suggestive pose, and also in the frame was his toddler. The man's wife tried to use the photo to press for custody arrangements to her liking, but the man insisted the photo was not suggestive and was being misconstrued.

He refused to be cowed, and the photo went all the way to a judge, Avery said. The judge ordered the girlfriend not to have contact with the child.

"People have a level of comfort in posting that they probably shouldn't have," Avery said.

"What I tell clients is, 'Don't post anything you wouldn't mind seeing in court.' "

Additional Facts

Don't make these mistakes

If you're going through a divorce, be careful of what you post on social networking sites. Lawyers and your ex could be watching. Here are some tips:

» **Talking trash:** Stay away from posting your thoughts or photos on pages of Facebook groups such

as "I hate my ex-wife." Such a move could hurt your reputation and credibility as you meet with lawyers and your ex to try to settle important issues such as who gets the kids, the house and other details.

» **Custody battles:** Don't let your new girlfriend or boyfriend post time-stamped pictures of your beach vacation on Facebook if you canceled time with your kids that weekend because of "an important business trip." And on dating sites such as Match.com, don't set up a profile claiming to be "single" with "no children" while seeking primary custody of those nonexistent kids.

» **Misleading statements:** Don't say what a hard time you're having finding a job if you're posting information on LinkedIn or other professional websites about a lucrative business venture or your many professional connections. What you say can and will be held against you.

-- *Tricia L. Nadolny and Star news services*

SLATE: Posted April 30, 2010

TWEET JUSTICE

Should Judges be using social media?

Judges are people too. They have spouses and children and long-lost high-school boyfriends. They have egos and ambitions, and some of them also have expensive election campaigns to finance. They are bombarded by requests to join Facebook, LinkedIn, and Twitter. And why shouldn't they? The judiciary is the only branch of the federal government with a negligible social-media presence. Sure, there are some unofficial Facebook fan pages ("Justice Scalia: defending the constitution, defending America") and unverified Twitter accounts (@USSupremeCourt), but there's nothing official but the sound of silence. Meanwhile, a full third of members of Congress tweet, the White House Twitter feed has 1.7 million followers. More than 8 million people "like" Barack Obama on Facebook. Americans constantly complain that the courts lack the transparency of the other branches. So wouldn't an ongoing judicial Twitter feed reassure us that our justices aren't hiding in a monastery, covered in bubble wrap?

Of course judges—even elected judges—are unlike public officials in the other two branches because they are supposed to be impartial and impervious to influence. Every tweet and Facebook update can be scoured for hints of bias and corruption. Every "friend" can be potentially compromising in some future litigation. Is there really any benefit to judicial transparency when the judicial ideal is an empty vessel? That's why judges approach the question of social media with trepidation.

It's hard to imagine judges—who work in a profession that generally requires 160 pages, plus footnotes, to say anything at all—communicating in 140 characters or fewer. But assuming it can be done, should judges do it? Last year the American Bar Association's judicial division held a panel titled "Courts and Media in the 21st Century: Twitterers, Bloggers, the New Media, the Old Media, and What's a Judge to Do?"

In an August 2009 article in *Texas Lawyer,* Miriam Rozen laid out some of the arguments for judicial use of social media. For instance, Susan Criss, a state judge in Texas, has a Facebook page she's used to friend lawyers for both networking and possible future campaign purposes. Criss gets around the ethical rules prohibiting *ex parte* communications between judges and lawyers by asking lawyers to "de-friend" her when they're trying cases before her. (They presumably can "re-friend" her when the case is over.) She has also used her Facebook account to monitor status updates by some of the lawyers who appear before her—one evidently asked for a continuance because of a "death in the family" while detailing drinking and partying on Facebook.

The same article describes how another Texas judge, Kathryn Lanan, requires that every youngster who appears before her in juvenile court friend her on Facebook or MySpace so she can keep track of their activities. If a juvenile in her charge posts anything about sex, drugs, or gangs, she hauls them back into court for a compliance hearing.

Constitutional free-speech questions aside, there's no doubt that some judges are finding social media an indispensible window into the lives of their charges.

But the ethical questions linger. In 2009, New York, South Carolina, and Florida each released judicial-ethics opinions on the subject. A North Carolina judge was reprimanded by his state judicial-standards commission last year for posting detailed status updates like "two good parents to choose from" in a custody case over which he was presiding. One of his "friends," a lawyer in the case, posted, "I have a wise Judge." Icky, yes. But unethical? The commission thought so.

In Florida, according to the *New York Times*, the judicial-ethics advisory committee issued an opinion last winter recommending against "judicial friending" and said a judge cannot friend lawyers who may appear before them or accept friend requests from those lawyers. The reason for the rule was that these relationships "convey to others the impression that these lawyer 'friends' are in a special position to influence the judge."

In the wake of that advisory opinion, Florida judges were forced to dramatically change their Facebooking habits. According to the *Orlando Sentinel*, there was a mass exodus of judges from Facebook, and lawyers were de-friended left and right. Many of these judges said they felt the committee attached far too much importance to Facebook friendship. A Facebook friend is hardly a trusted professional adviser. Perhaps that's why the advisory committee on standards of judicial conduct of the South Carolina Judicial Department issued an opinion allowing magistrate judges to be on Facebook and to be friends with law enforcement officers and employees—so long as they don't discuss anything related to the magistrate's duties.

If, as these examples illustrate, judges can figure out how to use Facebook or Twitter while still doing their jobs ethically and effectively, why are ethics committees so hopped up about it? It's because judicial ethics are so often about appearances, not reality. It's the appearance of impropriety you want to guard against, and if social media is about anything, it's about making complicated social relationships look simple. And just one careless tweet or status update is enough to compromise a whole career.

There is another reason, of course, that judges may not be keen to tweet or update their status: Because they'll look like idiots. Consider last week's oral argument at the Supreme Court in a case about privacy and pagers. The justices were considering whether sexy text messages sent and received by a California cop on a department-issued pager were private, when Chief Justice John Roberts, the youngest justice, asked: "What happens, just out of curiosity, if he is on the pager and sending a message and they are trying to reach him for, you know, a SWAT team crisis? Does the one kind of trump the other, or do they get a busy signal?" Justice Anthony Kennedy suggested that in such cases, perhaps the caller "gets a voice message that says: 'Your call is very important to us. We will get back to you.' "

The blogosphere had a great time after that argument, sending up the court's cluelessness about the very technologies it is supposed to be ruling on. But even Ashton Kutcher

might have a hard time detailing the lines between private and public, friend and "friend," opinion and influence out there on the Internets. It will take years for the courts to sort out questions about new technology and privacy. And by the time they do, Tweeting and Facebooking will be passé. When, decades from now, Chief Justice Suri Cruise is finally permitted to tweet her 112-character dissents, the younger judges will all snicker that she is hopelessly out of touch.

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SOCIAL MEDIA AND THE EMPLOYER

What is social media and why should a judge care about it as an employer? The term "social media" refers to the online technologies and practices that people use to share opinions, insights, experiences, and perspectives. Much of the time it is purely social, but it can also be used to establish business connections, make sales, and share community concerns. Social media takes many different forms, including text, images, audio, and video. The sites typically use technologies such as blogs, message boards, podcasts, wikis, and blogs to allow users to interact. A few prominent examples of social media applications are Google and Wikipedia (reference); MySpace, LinkedIn, and Facebook (social networking);YouTube (video sharing); and Flickr (photo sharing).

Social media is changing faster than any one can keep pace. Yet, it is such a vital source of information today that an employer is at risk if he or she chooses to ignore the phenomenon. Employers need to be aware of the opportunities offered by social media in order to do the best job of selecting and supervising employees. According to CareerBuilder, twenty-two percent of employers used social networking sites to screen potential employees in 2008 and this percentage had jumped to forty-five percent by June 2009. Because all judges have an ethical duty under Rule of Judicial Conduct 2.12 to require staff to act in a manner consistent with the judge's obligations under the Code, judges will want to be in the group of forward-thinking employers who use social media to their advantage.

The first and most practical use of social media for employers is in vetting a job applicant. Add internet searches to your due diligence in checking the backgrounds of job applicants. The primary sites to search are Google and the major social network sites; currently, Myspace, Facebook, and LinkedIn. Youtube and Twitter are other possible sources of information for applicants. When doing background checks, keep a record that lists your checking of the various social media sites. Note the date that you checked each site and what you found there, or that you found nothing there. If you do find relevant information, print off or save the screenshot to go in the applicant's employment file. You may find that either the applicant has not enrolled in a social network site or has set the site up with a privacy screen so that only confirmed friends may see the site. Nevertheless, there is always some information to be gained; you hope it is a positive verification of the information that you already have.

For Google, simply type in the name of the applicant and if the applicant has a common name, type in any additional information that might narrow the search. As with all things Googled, variety in your search terms is helpful in vetting an applicant. For example, on an applicant with a very common name, typing in the applicant's name paired with names of schools attended may give you information about Twitter status, while typing in the personal name with the name of the city the applicant lives in could give you the site of a Facebook account. Google is a particularly rich source for information on active attorneys.

Anyone may do a search on MySpace for free at myspace.com. If the applicant has a profile but made it a private one, you will not be able to see it. Facebook and Twitter are also free, but you have to set up an account with each one to use them. When you go to facebook.com, the centerpiece of the page is the sign up for an account, and Twitter.com also has a prominent "Sign up now" link. Be sure when you sign up that you make your site private. You may ignore requests to be "friends" unless you want to start using the site personally. If anyone mentions that you were sent a link to be that person's friend, you can explain that you set it up to check on an applicant but that you do not use it.

The primary reason for a social network search is that it may reveal information you need to know about the applicant. For example, a court will not want to hire an applicant who uses outrageous language and posts binge-drinking images on a site open to the public. There is a limited danger that you might find out information that you should not have, such as the political opinions of the employee. It is your responsibility to disregard information that is not relevant (race, gender, nationality, disabilities, religion and political party affiliation). However, if you disregard the information and hire the person, then there is no discrimination claim. If there are both relevant and irrelevant discoveries, simply download the relevant, disqualifying information and keep that with your record on which applicant you selected.

For current employees, these social networking can be a problem; that is, it can become social not-working. Another potential issue is posting of inappropriate material about the court and parties to cases by employee. One way to control this is to establish a written policy for your employees about what information may not be included in their personal postings on any type of internet site. This would be a policy that is in addition to or an amendment of your current internet and email use policy. Employees need to be given guidelines as to what information should be shared or not shared with you from social sites. For example, you do not want to know about any information on cases pending before you. However, you do want to know if your bailiff is reporting that he is drop down drunk every Saturday at the bar on the downtown square. Consider carefully before giving your employees or local attorneys access to your own social sites as friends. You may learn more about them than you want to know and vice-versa.

Social media also has a role when employment must be terminated. For involuntary terminations, the employee's access to the employee's office computer should be under control before or at the time that the termination occurs. Once you give notice to the employee that he/she no longer works for you, the employee must have no means to access the court internet or email system. Even for voluntary departures, it is recommended that the employee's access to the system be deleted sooner, rather than later. It is advisable to review the email and internet use of a terminated employee to determine if there has been violation of the internet and email policies, and or abuse of time. Such violations may mitigate or negate damages in any future lawsuit. This information may also give you insight into how much your current employees are using the internet and how well you are managing your employees' time. In addition, the review may provide you with information that you need on current work issues, such as

inquiries from the State Court Administration about forms that have never been completed. The best news is if the search reveals nothing new to you. However, if the search is revelatory, the value may be priceless. Employees have up to two years to file a cause of action against you on various grounds. Finding out about the employee's actual use or abuse of your policies can provide an excellent defense against litigation that you don't even know exists. Waiting until litigation is filed is too late as the hard drive will probably have been cleaned or destroyed by that time. Make it part of your regular process for an employment termination to do this review of the computer use.

If you need assistance with drafting or reviewing a policy or have any other concerns related to social networking, call your friendly legal advisor on employment law at (317) 234-3936 or email her at brodehef@courts.state.in.us.

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Florida Advisory Opinion 2010-4
A judge is not required to require the judge's judicial assistant to refrain from adding lawyers who may appear before the judge as "friends" on a social networking site as long as the activity is conducted entirely independent of the judge and without reference to the judge or the judge's office. If a lawyer attempts an ex parte communication through the social networking site, the judge should direct the judicial assistant to immediately "defriend" the lawyer and to immediately report it to the judge.

Florida Advisory Opinion 2010-5
A candidate for judicial office may add lawyers who may appear before the candidate if elected judge as "friends" on a social networking site and permit such lawyers to add the candidate as their "friend."

Kentucky Advisory Opinion JE-119 (2010)
A judge may participate in an internet-based social networking site, such as Facebook, Linkedin, Myspace, or Twitter, and be "friends" with persons who appear before the judge in court, such as attorneys, social workers, and law enforcement officials but should be mindful of whether on-line connections alone or in combination with other facts rise to the level of a close social relationship that should be disclosed and/or require recusal, and should be extremely cautious that such participation does not otherwise result in violations of the code of judicial conduct.

Florida Advisory Opinion 2009-20
A judge may post comments and other material on the judge's page on a social networking site but may not add lawyers who may appear before the judge as "friends" or permit such lawyers to add the judge as their "friend." A judicial candidate's campaign committee may establish a social networking page that allows persons, including lawyers who may appear before the judge, to list themselves as "fans" or supporters of the judge's candidacy as long as neither the judge nor committee control who is permitted to list herself as a supporter.

New York Advisory Opinion 08-176
Provided that the judge otherwise complies with the rules governing judicial conduct, he may join and use an Internet-based social network but should exercise an appropriate degree of discretion in how he uses the social network and should stay abreast of the features of any such service he uses as new developments may impact his/her duties under the rules.

South Carolina Advisory Opinion 17-2009
A judge may be a member of Facebook and be friends with law enforcement officers and employees of the judge as long as they do not discuss anything related to the judge's position.

Washington Advisory Opinion 09-05
A judicial officer may have an internet blog dedicated to promoting "a more fair, just and benevolent society" on which the judicial officer would post an essay and people would be able to comment and may respond to those comments but should exercise caution as to

how that blog is used and how he responds to the comments to ensure that the blog does not call the judicial officer's impartiality into question or impair the judicial officer's ability to decide impartiality issues that come before the judicial officer. The judicial officer may want to consider posting a disclaimer that the opinions expressed are only those of the author and should not be imputed to other judges and consider outlining the constraints to which judicial officers are subject such as the prohibition on commenting on pending cases or discussing cases with persons appearing before the judicial officer's court. If possible, the judicial officer should review a response before allowing it to be published on the blog, or alternatively, regularly monitor the responses to make sure that the thread of the discussion does not change into one not permitted by Canon 4.

Opinion 08-176

January 29, 2009

Digest: Provided that the judge otherwise complies with the Rules Governing Judicial Conduct, he/she may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules.

Rules: 22 NYCRR 100.2, 100.2(A); 100.3(B)(8); 100.4(A)(2), 100.4(G); 100.6(B); Opinions 07-141; 07-135; 06-149; 01-14 (Vol. XIX).

Opinion:

A judge received an e-mail inviting him/her to join an online "social network" and inquires whether it is appropriate for him/her to accept that offer and participate.

Social networks, as they are commonly known, are Internet-based meeting places where users with similar interests and backgrounds can communicate with each other. Users create their own personal website - a profile page - with information about themselves that is available for other users to see. Users can establish "connections" with other users allowing increased access to each other's profile, including, in many cases, the ability to contact any connections the other user has and to comment on material posted on each other's pages.

Although they vary in certain specific details, social networks generally allow users to reconnect with friends and family, discuss common interests, share photographs, and play games with each other. Other social networks, such as the one at issue in this inquiry, are more business-oriented in nature, with an almost-exclusive focus on professional networking and sharing of business-related information. The social network at issue would allow the judge to join an online community and interact with lawyers and litigants among many other users.

There are multiple reasons why a judge might wish to be a part of a social network: reconnecting with law school, college, or even high school classmates; increased interaction with distant family members; staying in touch with former colleagues; or even monitoring the usage of that same social network by minor children in the judge's immediate family.

The Committee cannot discern anything inherently inappropriate about a judge joining and making use of a social network. A judge generally may socialize in person with attorneys who appear in the judge's court, subject to the Rules Governing Judicial Conduct (the "Rules") (*see* Opinion 07-141). Moreover, the Committee has not opined that there is anything per se unethical about communicating using other forms of technology, such as a cell phone or an Internet web page (*see e.g.* Opinion 07-135 [permitting use of a website in a judge's campaign for office]). Thus, the question is not whether a judge can use a social network but, rather, how he/she does so.

The Rules require that a judge must avoid impropriety and the appearance of impropriety in all of the judge's activities (*see* 22 NYCRR 100.2) and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (*see* 22 NYCRR 100.2[A]). Similarly, a judge shall conduct all of the judge's extra-judicial activities so that they do not detract from the dignity of judicial office (*see* 22 NYCRR 100.4[A][2]).

What a judge posts on his/her profile page or on other users' pages could potentially violate the Rules in several ways. The Committee has, for example, advised that a court should not provide a link on its web page to an advocacy group for Megan's Law which listed the names and counties of residence for registered sex offenders (*see* Opinion 01-14 [Vol. XIX]; *but see* Opinion 07-135 [permissible to provide link to newspaper articles on judge's website, provided that they are dignified, truthful, and not misleading]). A judge should thus recognize the public nature of anything he/she places on a social network page and tailor any postings accordingly.

The judge also should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network. In some ways, this is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users can normally see the judge's friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a "close social relationship" requiring disclosure and/or recusal (*compare* Opinion 07-141 *with* Opinion 06-149).

Further, other users of the social network, upon learning of the judge's identity, may informally ask the judge questions about or seek to discuss their cases, or seek legal advice. As is true in face-to-face meetings, a judge may not engage in these communications. The Rules bar all judges from commenting publicly on pending or impending matters (*see* 22 NYCRR 100.3[B][8]). Likewise, a full-time judge may not practice law and can only act

pro se or give uncompensated advice to a family member (*see* 22 NYCRR 100.4[G]). Part-time judges, to the extent permitted to practice law (*see* 22 NYCRR 100.6[B]), should be mindful of the public nature of communications via social networks.

The guidance set forth above is, and can only be, a non-exhaustive list of issues that judges using social networks should consider. The Committee urges all judges using social networks to, as a baseline, employ an appropriate level of prudence, discretion and decorum in how they make use of this technology, above and beyond what is specifically described above. It is not difficult to find many mainstream news reports regarding negative consequences and notoriety for social network users who used social networks haphazardly (*see e.g.* Helen A.S. Popkin, *Twitter Gets You Fired In 140 Characters Or Less*, http://www.msnbc.msn.com/id/29796962/ [March 23, 2009, accessed April 10, 2009] [discussing dangers of postings about workplace on social networks]); *Facebook Post Gets Worker Fired*, http://sports.espn.go.com/nfl/news/story?id=3965039 [March 9, 2009, accessed April 10, 2009] [discussing termination of NFL team employee for criticizing a player personnel move on Facebook]).

Finally, the Committee is also aware that the functions and resources available on, and technology behind, social networks rapidly change. Neither this opinion, nor any future opinion the Committee could offer, can accurately predict how these technologies will change and, accordingly, affect judges' responsibilities under the Rules. Thus, judges who use social networks consistent with the guidance in this opinion should stay abreast of new features of, and changes to, any social networks they use and, to the extent those features present further ethics issues not addressed above, consult the Committee for further guidance.